

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS PEARSON,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 190124

Recorder's Court

LC No. 95-000505-FH

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his bench-trial conviction for larceny from a person, MCL 750.357; MSA 28.589. Defendant was sentenced to 18 to 120 months' imprisonment. We affirm.

Defendant's first issue on appeal is that the waiver of his right to a jury trial was invalid because there is no evidence on the record that the prosecutor consented to it, as required by MCL 673.3; MSA 28.856. We disagree. Whether a defendant's waiver of a jury trial conforms to the procedural requirements of MCL 763.3; MSA 28.856 is a question of law which is reviewed de novo on appeal. See *People v Wilkins*, 184 Mich App 443, 452; 459 NW2d 57 (1990).

"A fundamental rule of statutory construction is to ascertain the purpose and intent of the Legislature in enacting a provision." *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). The first step in determining legislative intent is to look at the specific language of the statute. *Id.* "Statutory language should be construed reasonably and the purpose of the statute should be kept in mind." *Barr v Mt Brighton*, 215 Mich App 512, 516; 546 NW2d 273 (1996). "A statute must also be construed to avoid absurd or unreasonable results." *People v Daniel*, 207 Mich App 47, 55; 523 NW2d 830 (1994).

As an initial matter, we note that this argument was rejected in *People v Gist*, 188 Mich App 610, 612; 470 NW2d 475 (1991), where a panel of this Court briefly concluded that "the prosecutor's consent is implied by the absence of any objection." We further conclude that the statute does not even require such a finding in order for a waiver to be validly executed. MCL 763.3(1); MSA 28.856(1), as amended by 1988 PA 89, provides in relevant part:

In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury.

A literal reading of this provision indicates that it was intended to benefit the prosecution, and not to safeguard procedurally a defendant's exercise of his statutory waiver rights. See, e.g., *People v Dobben*, 187 Mich App 462, 468; 468 NW2d 527 (1991), rev'd on other grounds 440 Mich 679; 488 NW2d 726 (1992); *People v Loy-Rafuls*, 198 Mich App 594, 601; 500 NW2d 480 (1991), rev'd on other grounds 442 Mich 915; 503 NW2d 453 (1993). Rather, the statute contemplates consent merely as a *condition* placed on a defendant's otherwise permissive statutory right to waive a jury trial. Nowhere does the statute require a finding of prosecutorial consent, express or otherwise, as a prerequisite to a valid waiver. Thus, defendant's challenge to the validity of the waiver on this ground must fail.

Defendant also argues that the waiver was not knowing and voluntary because the trial court did not explain to him that a jury must reach a unanimous verdict in order to convict him, while in a bench trial the judge alone would determine his guilt. As defendant concedes, this argument was previously rejected in *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). We agree with the panel in *James* that such advice is not required by case law, statute, or court rule. Further, after reviewing the record, we conclude that the trial court properly ascertained that defendant understood his right to have a jury trial and that he voluntarily waived that right. See *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). Consequently, the trial court's finding that defendant's waiver was made knowingly, voluntarily, and understandingly was not clearly erroneous. *James, supra* at 570; MCR 2.613(C).

Finally, defendant contends that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that "counsel's performance fell below an objective standard of reasonableness" and that counsel's deficient performance prejudiced the defendant so as to deprive him of a fair trial with a reliable result. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). A defendant has the burden of overcoming the presumption that he received the effective assistance of counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). A defendant must also show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *People v Messenger*, 221 Mich App 171, 181; ___ NW2d ___ (1997). Because defendant did not move for a new trial or a *Ginther*¹ hearing on the basis of ineffective assistance of counsel, appellate review is precluded unless the record is sufficient to support the claim and, if so, review is limited to mistakes apparent on the record. *Barclay, supra* at 672; *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

We have reviewed the existing record and conclude that it does not support defendant's claim that he was denied effective assistance of counsel. First, counsel's choice of tactics for impeaching the complainant with inconsistent statements was a matter of trial strategy that we will not second guess on

appeal. See *People v Caballero*, 184 Mich App 636, 639-640; 459 NW2d 80 (1990). Second, defendant has failed to establish that counsel's failure to call certain police officers deprived him of a substantial defense. See *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900; ___ NW2d ___ (1996). Finally, because the requirements for voice identification were met, counsel was not ineffective for failing to object to the complainant's testimony concerning defendant's threatening phone calls. See *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983); *People v Bozzi*, 36 Mich App 15, 22-23; 193 NW2d 373 (1971); MRE 901(b)(5). In sum, defendant has failed to overcome the presumption that he received effective assistance of counsel.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).